

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION

4 JUXTACOMM TECHNOLOGIES, INC.)
5) DOCKET NO. 2:07cv359
6 -vs-)
7 ASCENTIAL SOFTWARE CORP.,) Tyler, Texas
8 ET AL) 1:30 p.m.
) February 4, 2009

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10 TRANSCRIPT OF MARKMAN HEARING
11 BEFORE THE HONORABLE LEONARD DAVIS,
12 UNITED STATES DISTRICT JUDGE

13
14 A P P E A R A N C E S
15 SEE ATTORNEY SIGN-IN SHEETS ATTACHED AT DOCKET ENTRY 435

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20 COURT REPORTER: MS. SHEA SLOAN
21 211 West Ferguson
22 Tyler, Texas 75702
 903/590-1176

23 Proceedings taken by Machine Stenotype; transcript was
24 produced by a Computer.

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P R O C E E D I N G S

2 THE COURT: Please be seated.

3 All right. Ms. Ferguson, if you will call the case,
4 please.

THE CLERK: Case No. 2:07cv359, JuxtaComm v.

6 Ascential.

7 THE COURT: Announcements.

8 MR. MACON: Good afternoon, Your Honor. My name is
9 Larry Macon. Together with Johnny Ward, Kirt O'Neill, Holly
10 Dekam, Mike Kiklis and Scott Rhoades, we represent the
11 plaintiff JuxtaComm.

12 THE COURT: Very good.

13 MR. ALBRITTON: Hi, Your Honor. Eric Albritton.

14 With me is Marc Pensabene, John Desmarais, and Bob Appleby;
15 and we represent Ascential Software, Cognos, DataMirror, and
16 IBM. We are ready.

17 THE COURT: Thank you, Mr. Albritton.

18 Next .

19 MR. MALONEY: Collin Maloney and my co-Counsel Julie
20 Petruzzelli. We are here for MetaStorm, and we are ready to
21 go.

22 THE COURT: Thank you, Mr. Maloney.

23 Next .

24 MR. FINDLAY: Good afternoon, Your Honor. Eric
25 Findlay and Kelly Hunsaker here for Microsoft. Also with

1 is Rob Lytle.

2 THE COURT: Thank you.

3 MR. BUNT: Chris Bunt here on behalf of Business
4 Objects. With me today is Shamita Etienne-Cummings and Ms.
5 Jennifer Gossain.

6 THE COURT: Mr. Bunt.

7 MR. ERSKIN: Good afternoon, Your Honor. Blake
8 Erskin and Ryan Tyz for Informatica.

9 THE COURT: Thank you, Mr. Erskin.

10 MR. HARRISON: Your Honor, Guy Harrison for Software
11 AG and WebMethods.

12 THE COURT: Thank you, Mr. Harrison.

13 MS. ABERNATHY: Claire Abernathy on behalf of Open
14 Text.

15 MR. JONES: Thank you, Your Honor. Mike Jones and
16 Mark Evans for Sybase.

17 THE COURT: Okay. Thank you.

18 Anyone else? All right. Pretty good group today.
19 All right. Let's get started. I think I would like to start
20 with just a brief opening statement by each side, not more
21 than three or four minutes, just whatever opening comments --
22 I have, of course, reviewed the tutorials and the patent and
23 the briefs and all of that information. I don't need an
24 opening in that sense. But just anything that you think would
25 be important to me that I need to focus in on today and how

1 you would perceive would be the best way for us to proceed.

2 MR. O'NEILL: Your Honor, Kirt O'Neill for the
3 plaintiff. We did reach agreement on some other terms last
4 night.

5 THE COURT: Wonderful.

6 MR. O'NEILL: I believe we sent Mr. McLemore the new
7 claim chart by email last night, but I also had printed
8 versions for the Court and for Mr. McLemore. I also have it
9 on disk in WordPerfect form if you would like. The printed
10 copy may suffice.

11 THE COURT: All right.

12 MR. O'NEILL: The additional terms that we have
13 reached agreement on last night were "metadata database" and
14 "data bag." And we also reached an agreement concerning the
15 use of the word "component" in construction of two of the
16 claim terms; that being a "rule set processor" and a "script
17 processor," so we have agreed that those mean software
18 components.

19 THE COURT: Slow down just a minute here. Let me
20 catch up with you. Did you say "metadata database"?

21 MR. O'NEILL: Yes, sir. It is Element (b) of the
22 first claim.

23 THE COURT: What did you agree on?

24 MR. O'NEILL: We agreed -- it is on the right-hand
25 side there, "a database that stores the logical import and

1 export data interfaces, data transformation rule sets and
2 scripts used by the system."

3 THE COURT: All right. What was the next one?

4 MR. O'NEILL: The next one was "data bag," which is
5 at the very end of Claim 1. It is on Page 3 of the printout.

6 THE COURT: On what page of your claim chart?

7 MR. O'NEILL: On Page 3. It appears in Element (d),
8 "data bag." The agreed construction is in the row beneath
9 that.

10 THE COURT: You don't have your pages numbered here.
11 Page 3. All right. "Data bag."

12 (Pause in proceedings.)

13 THE COURT: All right. What is next?

14 MR. O'NEILL: And then I mentioned that we reached
15 agreement about the use of the term "component" in two of the
16 constructions. That agreement resolves only some of the
17 issues concerning "script processor" and "rule set processor."
18 So if you look at Element (c), which is on Page 2 of the
19 chart, the "script processor," although it is still disputed
20 in a global sense, we did agree last night that it is a
21 "software component." So you will see that in the competing
22 constructions they both now say "software component."

23 THE COURT: All right.

24 MR. O'NEILL: And the same for "rule set processor"
25 which is on Page 3. "Rule set processor," we have all agreed,

1 is a "software component," although there are other
2 differences still in the constructions.

3 THE COURT: All right. Anything further?

4 MR. O'NEILL: If the Court has a specific sequence
5 in which you would like for us to deal with the terms, we are
6 receptive to it. It seems like "script" got most of the
7 attention in the briefs.

8 THE COURT: Have y'all discussed an agreed method of
9 proceeding?

10 MR. O'NEILL: We have.

11 THE COURT: That will be fine.

12 Do the defendants wish to make an opening statement
13 before we begin?

14 MS. HUNSAKER: Yes, Your Honor. First I'd like to
15 thank Mr. O'Neill and JuxtaComm for what I thought yesterday
16 was a very cooperative dialogue --

17 THE COURT: I thank you both.

18 MS. HUNSAKER: -- on narrowing the disputes and
19 really trying to focus today on the main disputes between the
20 parties and the things that really matter. We appreciate that
21 from the side of the plaintiff.

22 In this case JuxtaComm is trying to expand the
23 meaning of the claims really beyond anything that is supported
24 in the specification. They entered into a crowded field and
25 right out of the chute in the file history acknowledged that

1 there was art out there that did what they did. And as a
2 result of that, they define some terms very narrowly. Now
3 they want it both ways so that they can apply one construction
4 for infringement in order to get the patent allowed.

5 They rely heavily on extrinsic evidence, and we
6 think that the defendants' constructions align most closely
7 with the claim language, with the specification, and with the
8 file history.

9 As Mr. O'Neill noted, really the main dispute
10 today -- there are others and we are prepared to talk about
11 all of them to the extent that the Court wants to have
12 argument and to the extent that it is necessary, but the main
13 dispute between the parties and I think where a lot of the
14 argument will focus, obviously, is on the "script" and "script
15 processor" terms and in particular whether those terms require
16 text commands that are interpretively executed --

17 THE COURT: Where they require what?

18 MS. HUNSAKER: Whether they require text commands as
19 opposed to some visual representation. And, secondly, whether
20 those commands are interpreted by the script processor and
21 what that means.

22 THE COURT: Okay.

23 MS. HUNSAKER: The defendants' position is that
24 those terms have very clear meaning in the ordinary course of
25 things to people of ordinary skill in the art at the time that

1 this application was filed. And the plaintiffs' construction,
2 on the other hand, essentially boils it down to any commands
3 executed by any software and we think read those limitations
4 out of the claims.

5 THE COURT: Thank you. What will be the first
6 term?

7 MR. O'NEILL: It will be "scripts," Your Honor. The
8 word "script" and "script processor" which processes the
9 scripts. We have the same issues or areas of disagreement
10 between the competing constructions. So in my presentation I
11 have kind of combined those two because the issues are
12 identical. And Ms. Hunsaker has graciously agreed to let me
13 proceed on that basis. And she did a very nice job describing
14 the three issues around "script," but let me do it again just
15 so we are clear.

16 Our construction is on the left on the screen. The
17 defendants is on the right. And there is some commonality
18 between the two, but there are three key areas of departure.

19 Number one, defendants say that scripts must be
20 interpreted or interpretively run, and they say that the
21 prosecution history so requires. We think that is not right,
22 and we will show you why it is not.

23 Number two, they say that because scripts must be
24 interpreted, they have to be run or executed or processed in a
25 very specific way. They say that it means that one command at

1 a time must be translated and executed at run time before the
2 next command is translated and executed. We will show you
3 that is a very narrow, almost an old-fashioned meaning of the
4 word "interpret" when we look at software interpreters and the
5 state of the art and software interpreters. So that is too
6 narrow and too limiting even if "interpret" does go into the
7 construction.

8 Number three, the third issue is whether the
9 ordinary meaning of "scripts" encompasses all types of
10 scripts, including graphical scripts. Our position is that it
11 includes all types of scripts; that it is not limited to
12 textual scripts or any specific type of scripts.

13 The issue that garnered most of the briefing was
14 whether or not a "script" must be interpreted. The defendants
15 are asserting that the prosecution history is clear; and that
16 scripts were limited to interpreted scripts during the
17 prosecution. They claim now it is not an issue of disavowal
18 of scope, but instead they are using the prosecution history
19 simply to construe or arrive at the ordinary meaning of the
20 term "script."

21 I think when you look at the prosecution history,
22 you will see that is not what is occurring. They are trying
23 to limit and narrow the claim scope by a single statement that
24 was used in the -- that was made in the prosecution history.

25 Moreover, they ignore that the significant part of

1 the prosecution history, the part that gained the allowance of
2 the claims in the patent were the amendments that were made.
3 All of the claims were amended at the same time identically in
4 the same fashion to overcome the prior art, and there were
5 remarks that accompanied those amendments. But the remarks
6 did not put forth additional arguments or distinctions or
7 further narrow the claim beyond the amendment. And I have the
8 amendments. I will show them to you momentarily. But the key
9 is that the amendment pointed up the distinction that the
10 prior art, the principal prior art reference that was relied
11 on to reject claims was this Morgenstern patent. And the
12 amendment says, "We distinguish over Morgenstern because
13 Morgenstern doesn't use metadata from a metadata database to
14 control data transformation." And that is the language of the
15 amendment, and that was the nature and the essence of the
16 remarks that were made to simply reinforce --

17 THE COURT: How did Morgenstern do it if it doesn't
18 use metadata?

19 MR. O'NEILL: Very good question. Here he comes.
20 This is Morgenstern, and the simplest figure that he shows.
21 Morgenstern is a data transformation tool. However,
22 Morgenstern is what was called a single-instance
23 transformation tool for a single, let's say, input or source
24 and a single output. So I have highlighted at the top of
25 Figure 2 of Morgenstern the source formatting information.

1 And on the left side I have highlighted the target formatting
2 information.

3 And what Morgenstern does is -- that green block
4 there in the center -- that accepts the source format
5 information and the target format information, as well as the
6 transformation rules from up above. And it churns all that.
7 And at the bottom it spits out a purely compiled, ready-to-go
8 single transformation tool that is suitable only for
9 transforming data from a single input format or source format
10 to a single target format.

11 So if you look at the bottom of the figure, you will
12 see on the left it is actually the input data, and it is
13 feeding into the orange block, which is this compiled, you
14 know, situation-specific program. It can run on a computer
15 and spit out on the lower right the data for the target
16 computer. One input format, one output format.

17 THE COURT: Okay. Response. Leave that one up, if
18 you would.

19 MS. HUNSAKER: I'm sorry?

20 THE COURT: I was telling him to leave that up, if
21 you would.

22 MS. HUNSAKER: Sorry. Let me get the right one up
23 there. We, respectfully, disagree with JuxtaComm that the
24 Morgenstern reference was limited to code that is fully
25 compiled to machine code. In fact -- and this is in Exhibit

1 G, which is the Morgenstern patent to my declaration in Column
2 25 between Lines 15 and 45. Morgenstern discloses that, in
3 fact, while you can use an information mediator bridge to
4 compile, it also recognizes that if an interpreted language
5 such as Lisp or Smalltalk is used, then the operation
6 distinction between these phases would not be as noticeable as
7 an interpreted language can both analyze and generate code and
8 then proceed to execute that code all in the same process.

9 Going down to the second highlighted box,
10 Morgenstern also discloses that a way to practice his
11 invention is that interpreted languages, such as Lisp, TCL/TK
12 or Perl provide an "eval" -- that's quote, E-V-A-L -- operator
13 that allows source code generated by a program to be
14 interpreted and executed by the program that created it.

15 And then I think the final box that is called out
16 here is particularly relevant to JuxtaComm's argument that
17 intermediate compilation would not have been within the scope
18 of what they disavowed. That is when Morgenstern also says
19 there are two viable alternative solutions. The first is to
20 create an internal language and interpreter for the
21 intermediate representation and use that for the description
22 and the interpretation.

23 So the suggestion that in disclaiming what was
24 taught by Morgenstern, it was limited to machine code
25 compilation, is not true because, in fact, Morgenstern itself

1 also taught intermediate format compilation. So we believe
2 that the format of the compilation, whether it is intermediate
3 format or to machine code was not relevant to what they were
4 telling the Patent Office was the point of novelty of their
5 invention.

6 THE COURT: Response?

7 MR. O'NEILL: Your Honor, Ms. Hunsaker is actually
8 making my point, so let me be clear. I agree that the
9 Morgenstern patent does talk about interpretation and not
10 exclusively compiling. Our point is that we did not in the
11 prosecution distinguish using a specific processing technique,
12 interpreting or compiling. What we distinguished was the use
13 of information from a metadata database. And that is the
14 claim amendment. So what I would like to do is show you the
15 claim amendment to see that it has nothing to do with whether
16 scripts are interpreted, compiled using some intermediate form
17 of processing.

18 Holly, can you show us the next slide.

19 The examiner -- before we show the amendment -- the
20 examiner says Morgenstern -- he acknowledges Morgenstern does
21 not expressly teach a metadata database. That was the --
22 where Morgenstern was lacking. He didn't say it implicitly
23 teaches it either. He says let's go to the Mitchell patent,
24 another patent and they have got a metadata database and he
25 makes the rejection saying it would be obvious to combine.

1 Here comes the amendment and here comes the distinction. The
2 amendment was, hey, we don't just have a script processor and
3 a metadata database, we have a script processor that uses
4 metadata from the metadata database to control all of this
5 data transformation. So it has nothing to do with
6 compilation, interpretation, or the specific processing --

7 THE COURT: You are saying your patent would not
8 read on anything that did not rely on metadata?

9 MR. O'NEILL: That is correct. Metadata from a
10 metadata database. And, in fact, all of the claims where I
11 have amended using identical -- virtually identical language,
12 that is the amendment to what is now Claim 1.

13 Holly, could we see the amendment to what is now
14 Claim 13.

15 The amendment is that the script processor utilizes
16 metadata stored in a metadata database to control this data
17 transformation. The added language is underlined, Your
18 Honor. Again, issued in Claim 17, the added language "script
19 processor for utilizing metadata from a metadata database to
20 control data transformation."

21 THE COURT: We will get to interpretive or
22 compilation in a moment. But, Counsel, I didn't really hear
23 in your response or response to his argument that they
24 distinguished over Morgenstern based on the metadata.

25 MS. HUNSAKER: The arguments are related. The

1 amendment --

2 THE COURT: Do you agree they are related, Counsel?

3 MR. O'NEILL: Tangentially related, but not related
4 in the sense that it impacts the claims.

5 THE COURT: All right.

6 MS. HUNSAKER: They are really fundamentally
7 related. The portion of the file history in which JuxtaComm
8 linked the amendment that it was making with its distinction
9 between Morgenstern's compilation and the patented invention's
10 interpretive solution is up on the screen now. This is
11 Exhibit F in the papers. And initially in describing
12 Morgenstern, JuxtaComm said that Morgenstern teaches directly
13 away from the claimed inventions. Morgenstern's compiled
14 information mediator bridge is inflexible.

15 This isn't highlighted, but the next sentence after
16 that says, "If either the source or the target database
17 structure are modified, the entire process must be reexecuted
18 and new information mediator bridge compiled." So, in other
19 words, once the compilation of the entire process occurs, the
20 source and the rules and the destination are fixed, so you
21 can't access metadata at that point in order to provide a
22 flexible solution.

23 Going on to the next paragraph, JuxtaComm very
24 clearly stated that in contrast, as noted above, the invention
25 uses a script processor. And here is where JuxtaComm linked

1 their amendment to their argument. The invention uses a
2 script processor which utilizes metadata stored in a metadata
3 database to interpretively convert data from a source to a
4 target format. The ability to use that metadata during
5 execution of the script processor is what gives it its
6 interpretive nature in contrast to the Morgenstern solution
7 that compiles the whole thing, fixes it, whether it is to some
8 intermediate format or to machine code, at which point it
9 couldn't access metadata if it was there, without recompiling
10 it.

11 So to argue that the amendment and these arguments
12 are unrelated or even to argue that they are only tangentially
13 related, does not match up with the intrinsic record.

14 MR. O'NEILL: Two things --

15 THE COURT: Okay. So you are saying it is not
16 really the metadata, but it is the use of the word
17 "interpretively"?

18 MS. HUNSAKER: The interpreted nature of the
19 solution allows them to access the metadata. So the
20 "interpretively" portion of this argument is the key phrase,
21 and it is not unrelated to the amendment that was made.

22 THE COURT: Okay. Response?

23 MR. O'NEILL: Two responses. Number one, Ms.
24 Hunsaker started out her argument by pointing out that the
25 Morgenstern patent mentioned interpretive techniques. So the

1 use of the word "interpret" by the patentee in our case could
2 not have been enough to distinguish.

3 Second of all, she has shown you only one of the
4 sentences that accompanies the claim amendments and explains
5 and says what the claim amendments are about and talks about
6 why the claimed invention is different. If I may, I can show
7 you all three so we can have a full picture.

8 THE COURT: All right.

9 MR. O'NEILL: Holly, can we go back to 2 -- I'm
10 sorry. The remarks on 2.

11 You will recall, Judge, that all three independent
12 claims were amended. In the application they were Claims 2,
13 14, and 18. So let me show you first the remarks accompanying
14 Claim 2. In stark contrast, the applicants' script processor
15 plays the key role in the conversion and uses the metadata
16 database associated with a conversion. What he is saying is,
17 hey, I have amended claims to say that I used metadata from
18 the metadata database and that is why I am different.

19 Notice he goes on to talk about scripts, but he
20 doesn't say they are interpreted. It says they are executed,
21 which doesn't impart any specific processing technique or
22 parameter on the scripts. Similarly --

23 THE COURT: Go back to that one, and let me get
24 Counsel's response to that one.

25 MS. HUNSAKER: There is no distinction there between

1 executing and interpreting. The way that an interpreter runs
2 a script is it translates and executes each command, so I
3 don't think there is a material distinction by calling it --

4 THE COURT: Doesn't a compilation involve execution,
5 as well?

6 MS. HUNSAKER: Compilation is a step before
7 execution. And in compiled solutions first the whole program
8 is compiled or the whole script is compiled; like the
9 translation of a book is the example that we used in our
10 tutorial. Executing a script is not using materially
11 different language than interpreting the script. You can say
12 you run a script, and it will still be interpreted. You can
13 say you execute a script, and it is still interpreted.

14 THE COURT: Response?

15 MR. O'NEILL: It is nonspecific as to the processing
16 technique. It says "execute." The other remarks also use
17 slightly different terminology, not interpret. This is the
18 remark accompanying the amendment to Claim 14. And you see,
19 it begins by focusing on the words that are actually in the
20 claim amendment. A script processor that utilizes metadata
21 stored in a metadata database to control the loading of data.
22 And then reading through the specific processing technique,
23 there really is none. It says performing the script commands.
24 I am sort of paraphrasing for you, Judge, there. But the last
25 part of the sentence is performing, and then there is one or

1 more script commands here. This is the remark accompanying
2 the Claim 14 amendment. It mentions no specific processing
3 whatsoever.

4 THE COURT: Response to that one.

5 MS. HUNSAKER: There is no rule of law that every
6 argument made in every sentence of the prosecution history has
7 to say the same argument and the same thing. In fact, the law
8 is to the contrary that any arguments made in support of
9 patentability are properly used to construe the claims. We
10 don't think that pointing to the next paragraph after the
11 patentee very clearly said Morgenstern teaches away and in
12 contrast we do it interpretively, embodies this statement
13 from that one.

14 THE COURT: Okay. Counsel?

15 MR. O'NEILL: The law, Your Honor, is -- it was on
16 our second slide, Purdue Pharma v. Endo Pharmaceuticals. The
17 law is that if there is going to be a surrender of claim scope
18 by argument -- and that is all we are talking about here --
19 well, I think they are remarks. I don't think they are
20 arguments. But even if they were arguments, we can't have a
21 disavowal unless it is clear and unmistakable. There is
22 nothing clear and unmistakable about using the word
23 "interpret" one time in a set of three remarks, each of which
24 accompanies a claim amendment that is crystal clear on its
25 face. The remarks --

1 THE COURT: Counsel, let me ask you why you believe
2 this rises to the level of a clear and unmistakable disavowal?

3 MS. HUNSAKER: Well, I am glad you raised that
4 because I would like to actually frame what defendants'
5 argument actually was.

6 THE COURT: Okay.

7 MS. HUNSAKER: We have said from our responsive
8 brief and also in our surreply responding to JuxtaComm's
9 insistence that our construction is based on disavowal, that,
10 in fact, our construction is the ordinary meaning of the term
11 supported by the specification, which I would like to talk
12 about at Slide 21 when the Court is ready to move away from
13 the file history.

14 THE COURT: So you are not really asserting
15 disavowal then?

16 MS. HUNSAKER: There is unmistakably and clearly a
17 disavowal of claim scope in this patent and in this file
18 history and the arguments we have just discussed. The
19 amendments made from the prior art saying that Morgenstern
20 teaches away and in contrast to that prior art JuxtaComm
21 executes the scripts interpretively. What we are saying,
22 however, is that our construction defines what the ordinary
23 meaning of a "script" is in view of this specification and
24 this file history at the time of the invention. You do not
25 have to find disavowal in order to adopt the defendants'

1 construction because we believe that it is ordinary meaning.

2 THE COURT: Let's talk about where you find that in
3 the specification.

4 MS. HUNSAKER: Okay. Marc, could you go to Slide
5 21. This is on Slide 21, Your Honor.

6 Now, I will tell you that the specification does not
7 use the word "interpreted"; but the only solution described in
8 the specification very clearly is an interpretive solution.

9 And no alternative solution, even though JuxtaComm says that
10 this was all well-known; that you could do it all kinds of
11 different ways, no compiled solution is ever disclosed.

12 So, initially, if you look at Column 4, Lines 43
13 through 45 of the patent it says that the script processor
14 identifies the script command and then invokes the correct
15 method for that script command.

16 THE COURT: Does it say where it gets the correct
17 method?

18 MS. HUNSAKER: From the other context of the patent,
19 they would get the script from the metadata database while the
20 script processor is executing.

21 Now, the reason you can tell that this is an
22 interpretive solution and not a compiled solution is that the
23 script processor first has to identify whether this command is
24 even there in the first place; and if it is, they have to
25 translate it into executable form and then execute it before

1 going on to the next one.

2 The Figure 6 is a good illustration of this point.

3 Figure 6 illustrates the eight text commands that JuxtaComm
4 said was their invention, and there is a decision tree at each
5 command. You go to load and there is a "Y" and a no. Is
6 there a load command? And if so, you load the data bag. And
7 then you go back. Is there a save command? And if there is,
8 you save the data bag to an external target and then you go
9 back. Is there a merge command? And if, so you merge the
10 two. And so on.

11 Now, if this was a compiled solution, Your Honor,
12 there would be no decision tree between these commands. If
13 this were a compiled solution, you would have a line straight
14 down the middle of Figure 6 where those Y's are. All of the
15 analysis would be done at once. And then the processor of the
16 computer would be getting a stream of 1's and 0's or a stream
17 of bytes. So the fact that you have to analyze each command
18 separately, figure out if it is there in the first place, and
19 then go to the metadata database to pull it in and invoke it,
20 this can only be an interpreted solution.

21 THE COURT: Response?

22 MR. O'NEILL: Your Honor, the target that I am
23 shooting at seems to be moving. First I heard the defendants
24 say that they thought there was a clear and unmistakable
25 disavowal from a prosecution statement made. Now we have

1 moved on to the detailed description of the invention and the
2 preferred embodiment. I am not sure how -- I don't think we
3 disagree that an embodiment to the invention may be
4 interpreted. But that is not the limitation of the claim
5 scope. So if we are starting from the premise that the patent
6 discloses one specific embodiment, we don't disagree.

7 THE COURT: Okay. Response?

8 MS. HUNSAKER: This is not disclosed as an
9 embodiment of the invention. This is disclosed as the
10 invention. If you look in the specification, the first time
11 that JuxtaComm begins talking about the preferred embodiment
12 is after the discussion of this. And if I could find the
13 correct slide I will direct the Court's attention to the
14 column.

15 So in Column 6, Line 38, which is after this is
16 described as the script processor of the present invention,
17 JuxtaComm then turns to describing an example of the preferred
18 embodiment.

19 (Pause in proceedings.)

20 THE COURT: Response?

21 MR. O'NEILL: The argument keeps changing as I stand
22 here, Your Honor, because this argument is not in their
23 brief. I understand Ms. Hunsaker now to be saying it is
24 defined as the invention and its interpretive scripts. It is
25 not in their brief, but I am happy to answer that. The

1 summary of the invention spans Columns 1 and 2 and then the
2 description of the figures, and then we have the detailed
3 description which runs for a full four columns, including
4 virtually every specific reference numeral to the preferred
5 embodiment illustrated in the drawings.

6 So it is clearly not correct that everything after
7 detailed description of the invention continues to be the
8 summary and limits the claims with every specific example and
9 every detail in Columns 3, 4, 5, and 6. It can't be the
10 case. We would have virtually no preferred embodiment left
11 and no claim scope.

12 THE COURT: All right. Okay. Very well.

13 What is our next term?

14 MR. O'NEILL: We are still on "scripts." The next
15 issue is whether if they are interpreted it must be one
16 command at a time as in the defendants' construction. I am
17 happy to address that if you wish.

18 THE COURT: All right -- why don't we let defendants
19 address that first and then you can respond.

20 MS. HUNSAKER: I'm sorry, Your Honor, address --

21 THE COURT: The other part of "script," whether it
22 has to be one at a time.

23 MR. O'NEILL: Actually that is not the one I was
24 referring to, the one command at a time. If you don't want to
25 do that separately, I would --

1 MS. HUNSAKER: No, you are right, Kirt, we should
2 address the one command at a time.

3 So, Your Honor, putting the slide back up that we
4 were just discussing, clearly in the specification JuxtaComm
5 describes the script processor of the present invention as
6 performing one command at a time, translating and executing
7 that command before going on to the next, and that is what
8 Figure 6 depicts.

9 We believe that the way that JuxtaComm used that
10 term in the specification and in the file history is
11 consistent with the ordinary meaning. I am going to scroll
12 through a couple of these because these are dealing with the
13 interpreted point that we already addressed.

14 So on Slide 27 -- and again this is consistent with
15 Figure 6 and the portion of Column 4 that we were talking
16 about -- the defendants' construction really is consistent
17 with the plain and ordinary meaning of "interpret"; and
18 JuxtaComm spoke in its reply as if we just cherry-picked the
19 few definitions of "interpreted" so we could come up with the
20 one that we wanted. But, in fact, consistently you can go
21 through and look at all of the dictionary definitions which
22 support what is in JuxtaComm's specification.

23 The IEEE software glossary of engineering
24 technology -- terminology, "to translate and execute each
25 statement or construct of a computer program before

1 translating and executing the next." Contrast with compile.
2 That is at Exhibit N.

3 The next one, "interpret, to execute a program by
4 translating one statement at a time into executable form and
5 executing it before translating the next statement." That is
6 Exhibit P.

7 The next one Prentice Hall's Illustrated
8 Dictionary. The interpreter converts and then immediately
9 executes each statement line by line. That is Exhibit Q.

10 The Computer Glossary, "interpret, translates one
11 program statement into machine language and executes it and
12 then proceeds to the next statement." Exhibit M.

13 The next exhibit IBM Dictionary of Computing --
14 THE COURT: I think we have covered enough
15 dictionaries.

16 MS. HUNSAKER: So we didn't cherry-pick this. This
17 is truly exhibited in a wide range of definitional sources at
18 the time of the invention, and we aren't relying on that
19 exclusively. We are relying, in fact, on the description of
20 the invention in the patent, which was the slide that we
21 discussed before.

22 THE COURT: Thank you.

23 Response?

24 MR. O'NEILL: Your Honor, the Federal Circuit has
25 been pretty clear, indiscriminate reliance on definitions

1 found in dictionaries can often produce the wrong results.
2 That is the Renishaw case, 158 F.3d, 1243. Dictionary
3 definitions don't always reflect the use of terms by people
4 skilled in the art. In fact, the Federal Circuit has said
5 don't look just at dictionaries, look at extrinsic evidence
6 that show how people actually use the term in the art.

7 And we have three pieces of what I think you will
8 find to be compelling extrinsic evidence. The first is
9 Microsoft's own patent from 1995 discussing prior art. This
10 is two years before the JuxtaComm patent was filed, and they
11 are discussing interpreters. Now, Microsoft pointed out in
12 their surreply brief that this actually is a patent on virtual
13 machines. That is true. But in this passage in their patent
14 they are talking generally about the art of software
15 interpreters, the prior art. And they make the point to say
16 that, hey, these are modern times, we have had interpreters
17 for decades; but by the '90s for efficiency many interpreters
18 first convert the program into a compact representation, such
19 as byte codes, and then they use a wide variety of approaches
20 to execute them.

21 So what they are saying is translate the whole
22 program first, and then execute the whole program. Don't
23 translate and execute one at a time because it is too slow.

24 In addition, I have textbooks, which we think are
25 much better evidence on how people skilled in the program

1 interpretation art, show how they use the word "interpreter."
2 Holly, could we see the 1971 textbook.
3 This is a college undergraduate course on computer
4 science compilers and interpreters. This is published by John
5 Wiley & Sons, 1971. They talk about interpreters. In fact,
6 they purport to set forth a definition here. If I could
7 direct your attention to what is underlined in blue. Even by
8 1971 the usual method of interpretation is to process the
9 program in two phases. The first translates it. I am going
10 to paraphrase a little bit, Judge, to shorten this up. The
11 second phase executes it. So you translate the entire program
12 and then you execute it.

13 Significantly, the first part of that paragraph,
14 which I have highlighted in yellow, talks about a form of
15 interpretation that the defendants are trying to force on us
16 here, and they are talking about the pure or early form of
17 interpreters from the '50s or '60s. It says in the pure
18 interpretation form, you analyze a source program statement
19 each time it is executed in order to discover how it performs
20 the execution. That is their construction of "interpret."
21 The textbook, 1971, says this, of course, is very inefficient
22 and is not used very often.

23 I have another textbook 1993, just four years before
24 the JuxtaComm patent was filed. This is Addison-Wesley
25 Publishing, again, for an undergraduate computer science

1 course on programming languages. It starts out saying an
2 alternative to compiling is interpreters. Here is where it
3 gets into the breadth of what the interpreters involve by the
4 '90s. "An interpreter can directly execute a source
5 program" -- that is the defendants' construction one line at a
6 time -- "but what is more common is for a source program to be
7 translated into some intermediate form, which is then executed
8 by the interpreter."

9 So textbooks show how it is used in the art. Your
10 Honor, I acknowledge these were not in our brief, but we just
11 think they are compelling. I have copies for the Court and
12 for the technical advisor just of the relevant pages, if you
13 would like them.

14 THE COURT: Any objection?

15 MS. HUNSAKER: No, Your Honor. I don't mind moving
16 targets.

17 THE COURT: Would you like to respond?

18 MS. HUNSAKER: Yes.

19 THE COURT: Okay.

20 MS. HUNSAKER: The Microsoft patent that they have
21 cited to is completely irrelevant. It is completely extrinsic
22 evidence. While we agree with Renishaw that indiscriminate
23 use of dictionaries is not permitted, we think we have shown
24 the Court through the specification and the file history that
25 it is not, indeed, indiscriminate use of the dictionaries but

1 dictionaries that, in fact, confirm the ordinary meaning used
2 in the intrinsic evidence.

3 Now, with respect to the idea that solutions have
4 been developed that partially compile an interpreted piece of
5 code to some intermediate solution, it still then interprets
6 it when it is run. This idea of compiling to an intermediate
7 format rather than all the way to machine code, is not at all
8 inconsistent with the defendants' construction. And this is
9 where we get into the disavowal rather than the affirmative
10 definition that we have put into our construction.

11 Our construction describes what a "script" is. What
12 we talk about when we discuss JuxtaComm's disavowal in the
13 file history is what a "script" is not. There is no
14 distinction in their arguments in the file history whether
15 something is compiled to an intermediate format or whether
16 something is compiled to machine code.

17 So to the extent there are solutions that are added
18 onto interpreters, to the extent that there are ways that
19 programmers have devised code to make interpreters run more
20 efficiently, when you look at the file history, JuxtaComm has
21 disclaimed those when they compile the entire process because
22 at that point you can no longer access your metadata database
23 to get your sources, your transformation rule sets, and your
24 targets.

25 THE COURT: Okay. Final word.

1 MR. O'NEILL: Holly, can we see Slide 14.

2 The specification, Your Honor, doesn't support such
3 a narrow interpretation of "interpreter." It doesn't support
4 using "interpret" as part of your construction at all. To the
5 contrary, it says variously we will run scripts, we will
6 execute scripts, we will perform scripts, we will just process
7 scripts. And this is consistent with the prosecution remarks
8 that were made, the ones I showed you earlier which had no
9 limitations on processing technique. The key was we utilize
10 metadata from a metadata database.

11 THE COURT: All right. Let's go on to what would be
12 next, and I will let defendants go first.

13 MS. HUNSAKER: Okay, Your Honor. Because it is very
14 related to what we have been discussing, we are going to argue
15 "using metadata from a metadata database" next. I will have
16 to find that. Oh, actually -- I apologize -- we still have to
17 fight about "text."

18 THE COURT: So which one are we doing?

19 MS. HUNSAKER: Well, so -- Kirt, we haven't gotten
20 to the text point.

21 There is still one area of dispute that we haven't
22 covered with respect to "script" and "script processor."

23 THE COURT: All right.

24 MS. HUNSAKER: And that is whether the ordinary
25 meaning requires text commands or can also include visual

1 representations. So we are actually still on Kirt's term.

2 MR. O'NEILL: We are still on "script"; I'd be happy
3 to let her go first.

4 THE COURT: All right. Go ahead.

5 MS. HUNSAKER: So, Your Honor, at the time of
6 JuxtaComm's alleged invention with the provisional application
7 filed in '97, "scripts" were commonly understood as a short
8 program of text commands. The specification that we cited
9 before describing Figure 6 -- excuse me. In the summary of
10 the invention, JuxtaComm says that it is another object of the
11 present invention to provide a script processing language that
12 defines operations, not selects them or drags and drops them
13 but actually defines them.

14 In the specification there is also dependent claims
15 that support the defendants' proposed construction that these
16 are, in fact, text commands. Dependent Claim 10 talks about
17 script control language. Dependent Claim 11 says that said
18 script control language comprises a set of script commands and
19 then the processor executes -- there is also a script command
20 processor to process and execute each of a number of script
21 command lines.

22 JuxtaComm admits in their reply brief -- or excuse
23 me -- in their opening brief at Page 12, that this is, in
24 fact, referring to lines of text.

25 And then, finally, in Dependent Claim 12 it talks

1 about a system wherein a set of script commands comprises the
2 load save, and so on and so forth.

3 It is interesting to note that JuxtaComm's
4 preliminary claim construction of "script" was a group of
5 commands in a script control language. That was subsequently
6 dropped. But this is part of the language of the spec that we
7 believe demonstrates that these are lines of text.

8 JuxtaComm will argue that, in fact, what these show
9 is a claim differentiation argument, but that is not true
10 because in Independent Claim 1 what the claim is referring to
11 is a "script." And what is referred to in Dependent Claim 10
12 through 12 is the language by which those "scripts" are
13 entered.

14 This was the slide I was looking for before, but at
15 Column 5, Line 55 and then carrying over to Column 6, this is
16 where Figure 6 is described. And, again, it is -- Figure 6 is
17 a flow diagram showing the actions taken by the script
18 processor of the present invention, not the preferred
19 embodiment, not an example but the present invention, and then
20 the text commands which JuxtaComm agrees are text commands are
21 then set forth in the specification.

22 In Figure 8 an exemplary script, and this is an
23 exemplary script. It also depicts the text commands of
24 loading a particular source of formatting it and then saving.
25 Again, text commands are there. I won't belabor the

1 dictionaries again. They are cited in our papers, and they
2 are in the exhibits. But there are a number of dictionaries
3 that also support what is in the specification; that scripting
4 language have several defining characteristics; it is
5 generally stored as plain text not a compiled binary. Again,
6 you can see the relation to the disclaimer and the arguments
7 in the file history. The programs are entered with any text
8 editor. The next one "script" is commands that could have
9 been entered by a keyboard or English-like commands,

10 Now, JuxtaComm has cited -- there was one cited in
11 their opening brief that talks about something referred to as
12 visual scripting. And, again, we don't think these are
13 relevant in any way, shape, or form to the claim construction
14 issues. These are purely extrinsic evidence, not rising even
15 to the level of dictionaries. The one they cited in their
16 opening brief specifically said, you know, this is just a
17 prototype. And there is no way to know the correct
18 functionality and the proper interface can be totally
19 anticipated. So at this point in time the people that were
20 out there trying to create visual scripting were saying, you
21 know, it looks promising but we just don't really know how to
22 do it yet.

23 These are the articles that were cited in
24 JuxtaComm's reply. They are all to the same effect. None of
25 them are dictionaries. None of them have been adopted by the

1 dictionaries. None of them are supported by the
2 specification. They talk about a prototype -- and I apologize
3 for not having the exhibit numbers on these, but these were
4 exhibits attached to JuxtaComm's reply brief. The first
5 excerpt up there says, you know, we plan to bring this future
6 and the first prototype to the attention of users. They are
7 already working in several areas of application development.
8 The next one, we have implemented a prototype visual scripting
9 too, and we are building a pilot system, and so on.

10 So to argue that these show people of ordinary skill
11 in the art understood the word "script" to include visual
12 scripting, couldn't be farther from the truth. And, in fact,
13 this really supports the defendants' argument. If the
14 researchers out there who were trying to implement these
15 prototypes and were struggling with doing that at the time or
16 just before JuxtaComm's alleged invention, the idea that their
17 patent somehow covers what these researchers were just
18 beginning to be able to figure out how to do, is not supported
19 by the specification, is not what they claimed in the
20 invention, and falls squarely within the line of cases that
21 you can't interpret a term beyond what is supported in the
22 written description.

23 THE COURT: Response?

24 MR. O'NEILL: Your Honor, visual scripting was well
25 known by 1997. We have copious extrinsic evidence on that.

1 The issue of whether the specification for JuxtaComm talks
2 only about text is a red herring. We don't deny that the
3 examples of scripts shown in the patent are composed of text.
4 But the question is whether people skilled in the art in 1997
5 would have understood that scripts mean graphical scripts as
6 well as text and whether they could create those types of
7 scripts.

8 These are not isolated research articles. They span
9 a decade. One of the earliest ones we gave you is from a
10 gentleman named Kappel. He was writing in a publication that
11 was published by the Commission of the European Communities.
12 He says we have a visual scripting language. He doesn't say
13 we have the first visual scripting language ever. In fact, he
14 speaks about visual scripting as if the concept itself is
15 well-known. He says we are doing a new one here, here is a
16 new language. By the way, notice the use of the term
17 "language"; so in the JuxtaComm patent claims where they talk
18 about script languages, the word "language" doesn't limit it
19 to text. They call visual scripting techniques, languages
20 also. It is a language.

21 1991, a group led by Mr. Nierstrasz says he has a
22 visual scripting tool. Again, he doesn't say we have the
23 first one. He, in fact, speaks of visual scripting as
24 something that is relatively common. He is just trying a
25 different tool, a different language. In fact, here is a very

1 simple visual script or graphical script so you can see how
2 simple it is to create one of these things. You drag and drop
3 icons from either a pull-down menu or off of a pallet. You
4 put them on your desktop and you may label them with a
5 keyboard. And then you put connections between the two. And
6 once you have done that, if you have the right software behind
7 it, you have a script. That is how simple it is.

8 In 1996, Mr. Shigesada, writing in by way of the
9 IEEE Computer Society Journal here in the United States, he
10 says he has a visual script language. He calls his VACL. But
11 the point is, visual scripts were known, they weren't magic,
12 and people knew how to do them.

13 Holly, can we show the next slide --

14 THE COURT: Let me ask you this: Is it necessary
15 for them to have been known in order for it to not be limited
16 to text commands?

17 MR. O'NEILL: I don't know if it is necessary, but
18 we know they were known. So as long as -- the only
19 requirement is that it be enabled. Of course, you can't cover
20 things that people wouldn't know how to do other than,
21 perhaps, under the doctrine of equivalents, which is another
22 issue that we will get to. But, clearly, people were enabled
23 to do this. They knew how to do it.

24 On the left up there is a graphical programming
25 technique used by one of these defendants in this courtroom,

1 Ascential. They have got a product. This is from the
2 tutorial, Your Honor, from the mid-'90s. They have some
3 graphical programming on the left. You can see how simple it
4 is to create programs using icons and dragging and dropping.
5 The one on the right is a current visual script from IBM. It
6 is one of the products in this case. You can see how simple
7 it is. This is a real-world product that does data
8 transformation. Your Honor, that visual script is not
9 difficult, it is not hard.

10 THE COURT: Final word on "script."

11 MS. HUNSACKER: Your Honor, whether it was known by
12 some researchers around the corners of the world who were
13 trying things, whether it was known is not the standard for
14 whether it is ordinary meaning. I think Counsel is confusing
15 the concepts of invalidity with the concept of whether at the
16 time of the alleged invention the ordinary meaning of "script"
17 was text commands and the written description of the patent
18 not supporting visual design tools as falling within that. So
19 whether it was known is not the point.

20 None of these articles describing the research that
21 was being conducted were in the patent or in the prosecution
22 history. Three of the six are from the same group of Swiss
23 researchers describing the same system, and they say we are --
24 only recently are we close to achieving the dream. This is
25 not common and ordinary meaning. It may show certain aspects

1 of invalidity. It may show certain aspects of obviousness,
2 but certainly it does not show that it was ordinary meaning.
3 Three of the six don't mention "scripts" at all. That is
4 another point which is JuxtaComm equating a visual design tool
5 with a script.

6 So we don't think there is any support anywhere,
7 either intrinsically or extrinsically to construe "script"
8 beyond text commands.

9 THE COURT: Thank you. What would be your next
10 term?

11 MS. HUNSAKER: Now is the "utilizing" term. So we
12 have actually already discussed quite a bit of this term
13 because it was central to their arguments during prosecution
14 about why the script processor executed the script
15 interpretively. I have put here the parties' respective
16 constructions and that the dispute is whether "utilizing
17 metadata from a metadata database" means "accessing specific
18 metadata during execution of a script" or "using any metadata
19 at any time."

20 Now, I should pause for a moment and tell the Court
21 that Mr. O'Neill and I yesterday exchanged -- had some
22 dialogue whether there was any room for compromise on this
23 term. And as they are currently written, there is really two
24 areas of dispute, two competing parts of the construction.
25 One is what is "metadata"? Is it the "metadata" of the patent

1 or is it -- the common definition of "metadata" generally is
2 data about data, which could be file creation dates and all
3 kinds of things that would never let anybody do this
4 invention.

5 So one of the issues posed to Mr. O'Neill to see if
6 we could reach agreement was whether at least we agree that
7 the "metadata" referred to in this claim term is the logical
8 import and export data interfaces, the data transformation
9 rule sets, and then we had some discussion about adding
10 "script" to that definition of "metadata" because Mr. O'Neill
11 felt that that was missing. I believe the consensus among the
12 defendants is that we could and probably should define
13 "metadata" consistently in this term as we have in the agreed
14 term "metadata database." So I can help the Court with what
15 that would look like.

16 THE COURT: Did you come to an agreement?

17 MS. HUNSAKER: We didn't talking, but we were
18 talking late and early again this morning, so maybe when it is
19 Mr. O'Neill's turn he can speak to that point.

20 THE COURT: All right. Go ahead.

21 MS. HUNSAKER: The second disagreement -- and this
22 is one that, unfortunately, we won't be able to reach
23 agreement on, is whether the script processor must use that
24 "metadata" at run time during execution of the script
25 processor as opposed to some other earlier point in time like

1 you might find in a compiled solution.

2 So I think it is important always to look at the
3 context of the claim. This one in particular at Subparagraph
4 C is where it appears. And it is a term that modifies the
5 "script processor" term. Your Honor will remember the
6 discussion at the beginning of the argument about the file
7 history arguments that were made and the amendments that were
8 made; and, indeed, this was the phrase that was added to all
9 of the independent claims of the patent in conjunction with
10 JuxtaComm's argument about the script processor executing
11 interpretively.

12 So one of the agreed definitions that we came to a
13 compromise or an agreement on yesterday is "metadata database"
14 which is a database that stores these three things; the
15 interfaces, the rule sets, and the scripts. So we all agree
16 that is what is in the "metadata database"; and we think that
17 is how "metadata" in this term should be construed. And that
18 would require a slight modification from what we had
19 originally proposed, but we offer that --

20 THE COURT: You are now adding "scripts," right?

21 MS. HUNSAKER: I'm sorry?

22 THE COURT: You are now adding in "scripts"?

23 MS. HUNSAKER: Right. That is in part --

24 THE COURT: Is that in agreement?

25 MR. O'NEILL: We do agree that it should be part of

1 the metadata that it is utilized, but I have asked how do they
2 intend to put that into their proposed construction because it
3 really doesn't seem to fit?

4 If y'all have a proposal --

5 MS. HUNSAKER: Yeah. And the way we would propose
6 that, going back to our definition -- and I apologize that I
7 don't have a slide with this on it. I will certainly provide
8 that to the Court -- would be adding the word "and scripts"
9 after "rule sets" so that you access the logical import and
10 export data interfaces, data transformation rule sets, and
11 scripts from the metadata database --

12 THE COURT: Where are you reading from?

13 MS. HUNSAKER: There is the defendants' proposed
14 construction.

15 THE COURT: For?

16 MS. HUNSAKER: For "utilizing metadata."

17 THE COURT: From the metadata database?

18 MS. HUNSAKER: Yes.

19 THE COURT: What is your proposed construction now?

20 MS. HUNSAKER: So the modification would be to add
21 "and scripts" after "rule sets." And instead of "during
22 execution of the script," it would be "during execution of the
23 script processor."

24 THE COURT: "Of the script processor"?

25 MS. HUNSAKER: Yes.

1 THE COURT: Is that agreeable to plaintiff?

2 MR. O'NEILL: Your Honor, it is not, for reasons
3 which I am happy to go into when it is my turn.

4 THE COURT: Okay. It is not agreeable.

5 MS. HUNSAKER: And I know that he doesn't agree to
6 the part about "during execution of the script processor," and
7 I didn't expect that he would; but, perhaps, when he speaks he
8 can talk about whether "metadata" means anything different
9 than what is described throughout the patent.

10 THE COURT: Okay.

11 MS. HUNSAKER: Again, looking at some of the
12 intrinsic evidence, the summary of the invention says the
13 present invention can be used to create these things and to
14 control the usage of all those definitions in the process of
15 transforming and exchanging the data. So, again, describing
16 this in the summary of the invention as the present invention
17 that this must be used during execution, this ties directly to
18 the arguments that they made in the file history, which was
19 that you use the script processor -- or the script processor
20 use the metadata in the metadata database to interpretively
21 run the scripts.

22 Some of the dependent claims, likewise, reflect that
23 particular metadata, an import data view or an export data
24 view is used during execution of the script processor. So,
25 again, in order to make that amendment meaningful, these

1 "metadata" -- the "metadata" actually has to be used during
2 the execution of the script processor. And, again, other
3 parts of the specification say that, you know, as will be
4 shown import data view will be used during the execution of
5 the script processor. Data bag will be used during the
6 execution of the script processor. The load command permits
7 an import data view to be used, and so forth.

8 We have already discussed this. This was the term
9 that was added to all of the claims. I won't go through this
10 again, but the same arguments that we were describing before,
11 really make this a dynamic process of accessing this metadata
12 database at run time, which you aren't able to do with the
13 solution that has already been compiled.

14 THE COURT: Okay. Response?

15 MR. O'NEILL: Your Honor, I think what Ms. Hunsaker
16 said is we all agree that when it says "utilizing metadata,"
17 we know what that is; it is the three pieces of the "metadata"
18 that are set out in the claim. It is the data interfaces, the
19 rule sets, and the scripts. That part of it we all agree on.

20 If we look at their construction -- we started out
21 by saying no construction is needed. The reason we said that
22 is because the claim already says what is in the metadata
23 database. We don't think there is any need to repeat the same
24 thing. But we are happy as an accommodation to have the
25 phrase construed to reiterate that "utilizing metadata" means

1 utilizing the logical import and export data interfaces, data
2 transformation rule sets, and scripts.

3 The problem with the defendants' construction is
4 that they impose an additional timing requirement through the
5 use of the word "access." They would require that information
6 be accessed during execution of a "script." It is not in the
7 specification, it is not in the prosecution history, and it is
8 an attempt to unduly limit the claims with no support.

9 Remember, the operative claim amendment was "utilizing
10 metadata from a metadata database." It just means that you
11 have to use it.

12 None of the claims that Ms. Hunsaker showed you have
13 this timing requirement or this temporal requirement here.
14 All of the claim amendments that she showed you are consistent
15 with simply using the metadata at the appropriate time. So
16 what we object to and what is clearly not right is "accessing
17 during execution of a script." You won't find it anywhere in
18 the patent or the prosecution history.

19 THE COURT: The final word on this one.

20 MS. HUNSAKER: In our modified construction, which
21 we will provide to the Court, we did propose changing "during
22 execution of the script" to "during execution of the script
23 processor"; and we showed the Court all of the places in the
24 specification, including the summary of the invention, and
25 elsewhere where the metadata is, in fact, utilized during

1 execution of the script processor.

2 And I guess in closing, Mr. O'Neill's argument
3 demonstrates so clearly why it is so important to read the
4 claims not in isolation but in view of the specification and
5 the prosecution history. If you are going to pull "metadata"
6 prior to some compilation and then compile it so it can't be
7 changed unless you recompile it and reexecute that all over
8 again, that is exactly what they said taught away from the
9 invention. And that is exactly what they said they didn't
10 do.

11 So the temporal aspect comes from the fact that in
12 the prosecution history they said, you know, we don't do this
13 before because that is inflexible, and you have to redo the
14 whole thing if you do that. What we do is utilize the
15 metadata database when the script processor interpretively
16 executes the script. So we think this claim term read in the
17 context of the specification and the file history require that
18 that utilization occur during execution of the script
19 processor.

20 THE COURT: Very good. What is your next term?

21 MR. O'NEILL: "Rule," Your Honor, I guess we are on
22 to "rule." This will be short and sweet.

23 THE COURT: All right. Good.

24 MR. O'NEILL: The audience is on the edge of their
25 seats, Your Honor. "Rule" we say one or more statements.

1 There is at least some commonality here with the defendants' 2 construction, but they want to add a bunch of stuff to it. 3 And they do that by cutting and pasting from the 4 specification. I will show you how. And they -- 5 significantly they add this requirement that the statements in 6 a "rule" have to be executed from top to bottom, which is not 7 correct because among other things -- among other reasons it 8 excludes some of the disclosed embodiments of the invention.

9 The common part of the construction that the parties 10 agree on comes from this sentence in the specification where 11 it says a "rule" is one or more statements. I guess we all 12 agree that we look there. That is what the sentence says. 13 That is virtually self-definitional. By the way, the Federal 14 Circuit in the Sinorgchem case says when the patentee uses 15 "is" that can clearly signify that the patentee intends to 16 define something. Here is what it is.

17 The defendants have gone further. They get their 18 extra parts of their construction from the surrounding 19 sentences. Above the part in the blue is their portion of the 20 construction dealing with what a "rule" might be used for. 21 Below is their part of the construction that says that the 22 statements must be executed from top to bottom. We don't need 23 the purpose-oriented language from above. The claim already 24 states what "rules" are used for. And we certainly don't need 25 the stuff from down below. Remember, this is set out in the

1 detailed description, so we have got a definitional statement
2 using the word "is" and we don't need anymore.

3 If we add the other stuff that defendants want to
4 add, what we do is we wind up excluding some of the disclosed
5 embodiments. There is no intention in the patent, Judge, to
6 exclude these embodiments. So Figures 9 and 17 from the
7 patent are examples that are set out, they are relatively
8 simple examples of "rules," and let me see if I can walk you
9 through these --

10 THE COURT: That's okay. Let me hear a response.

11 MR. PENSABENE: Your Honor, the important point here
12 is that the parties agree that the term is defined in the
13 specification. The only dispute here is as to what that
14 definition is, how much of the statement in the specification
15 needs to be included.

16 The defendants submit that all of the language
17 quoted on the screen now from Column 5 constitutes that
18 definition. If I can read it, it says, "The purpose of a rule
19 is to perform a specific operation to achieve a desired
20 result. A rule is one or more statements. These statements
21 are executed from top to bottom." And then it goes on. In
22 each case using the word "is" or "are," as Mr. O'Neill pointed
23 out, is a sure sign that the patentee is defining the claim
24 term.

25 If you compare this language, this very precise

1 definition to what the defendants propose, you will see it
2 copies it almost verbatim. The only difference is that the
3 defendants have kind of shortened it up a little bit to make
4 it a little more readable. What the plaintiff would like to
5 do is take out one little snippet of that definition, one
6 piece of that definition, and put that forward as the entire
7 definition.

8 Under the Sinorgchem case, which Mr. O'Neill cites,
9 that is plainly the wrong approach. That case clearly states
10 that you cannot just take a piece of the definition; you have
11 to take the whole definition where it is set forth in the
12 specification.

13 The example Mr. O'Neill cites is conditional
14 processing and looping. He cites these as a reason why the
15 defendants' constructions are incorrect. He argues that the
16 requirement that the rules be executed from top to bottom
17 would exclude one of the disclosed embodiments. What Mr.
18 O'Neill fails to state, though, is that there is only one
19 disclosed embodiment in the specification. The specification
20 doesn't give alternate embodiments or different ways to do
21 it. It only describes the one way.

22 The other interesting thing to note is that the
23 description of this conditional processing and looping follows
24 immediately after the definitional language which the
25 defendants quoted in their definition. So the specification,

1 the patentees themselves show no inconsistency, and we submit
2 there is none. Conditional processing and looping are just
3 simple forms of flow control, very common and understood in
4 the art. It is a simple way of doing flow control when you
5 have got sequential execution; i.e., top-to-bottom execution.
6 There simply is no inconsistency.

7 JuxtaComm, as I said, seeks to exclude most of the
8 definition, most of the cited definition from its proposed
9 construction. It cites no legal or factual basis for doing
10 this. What is interesting is that when looking at other claim
11 terms, for example "data bags," JuxtaComm does adopt a
12 definition and agrees to a definition that relies on multiple
13 sentences taken from the specification. In the case of "data
14 bags," that is set forth at Column 4, Lines 12 to 21.

15 Likewise, dictionaries cited by the defendants,
16 these are cited for other terms like "interpreted" and
17 "scripts." There are numerous examples in those dictionaries
18 of definitions that use multiple sentences to define a term.
19 There simply is no logical reason to limit the definition of
20 "rules" in this case to one sentence taken out of context.

21 THE COURT: Okay. Thank you.

22 What is the next term?

23 MR. O'NEILL: The next one is "rule set processor,"
24 Your Honor.

25 MR. PENSABENE: I am sorry, do you want to do "data

1 transformation rule sets" since it is kind of related?

2 MR. O'NEILL: I've got "rule set processor" next.

3 MR. PENSABENE: That's fine.

4 THE COURT: All right. We will let defendant go
5 first on this one.

6 MR. PENSABENE: Your Honor, for "rule set
7 processor," the dispute centers around whether or not the
8 "rule set processor" is a separate component invoked by the
9 script processor. The defendants submit that our
10 construction, which sets forth that requirement, is clearly
11 supported by the specification consistent with the figures,
12 the specification, and the inventor's testimony; whereas, the
13 definition offered by the plaintiffs has no real meaning.

14 Looking first to the specification, we see that
15 Figure 2 clearly shows the "rule set processor" as a separate
16 component that is invoked by the script processor. You will
17 see there is a one-way arrow pointing from the script
18 processor to the "rule set processor" indicating the
19 invocation of the rule processor.

20 Likewise, the specification specifically describes
21 the rule processor as being "invoked by the script processor."
22 This responsive terminology is not used in the specification.
23 It is not explained what it means. And "invoked" actually
24 adds meat to that definition and explains what it means.

25 THE COURT: Aren't you really then arguing over

1 what "responsive" means as opposed to what "software that
2 processes a rule set" means?

3 MR. PENSABENE: That may be one way to look at it,
4 Your Honor. Your Honor is absolutely correct. So maybe the
5 problem is what we are defining. In that case maybe we need
6 to define what it means to be a "rule set processor responsive
7 to a script processor," in which case, again, we would argue
8 that it means to be "invoked by."

9 THE COURT: And you were saying that "responsive" is
10 synonymous with "invoked"?

11 MR. PENSABENE: That's correct, Your Honor.

12 THE COURT: Okay. Response?

13 MR. O'NEILL: Your Honor, I think the issue does
14 revolve around the word "invoked." That is where the briefing
15 is centered on at least. Our position is a fairly simple one.
16 The claims says responsive to. That sets forth the claim
17 relationship. There is no need and no reason to replace that
18 word with the word "invoked." In fact, there is a clear
19 reason, a legal reason not to. That reason is that --

20 Holly, could we have the next slide.

21 "Invoked" is used in Dependent Claim 9. And, as the
22 Court is aware, when you have a limitation in a dependent
23 claim, it sets up a presumption that it is not to be read --
24 that the independent claim is broader, and without a good
25 reason you should not take dependent claim limitations and put

1 them up into the independent claim.

2 THE COURT: What is your response to the claim
3 differentiation argument?

4 MR. PENSABENE: Our response to that is fairly
5 simple. Claim 9 does not describe a different relationship
6 between the script processor and the rule set processor.
7 Again, our position isn't that "invoked" is being used here
8 synonymously with "responsive to"; rather, our position is
9 that Claim 9 be -- limitation added by Claim 9 is toward the
10 end of that claim where it says that the transformation is
11 based on predefined data transformation rules, the
12 "predefined" being the difference from the independent claim.

13 THE COURT: Okay. Final word.

14 MR. O'NEILL: Your Honor, if the defendants contend
15 that "invoked" is somehow narrower than "responsive to," and I
16 assume they do because they have asked you to replace the word
17 "responsive" with "invoked" in Claim 1, then it logically
18 follows that Claim 9 is somewhat narrower, and the doctrine of
19 claim differentiation should take care of this.

20 THE COURT: All right. What is the next term?

21 MR. O'NEILL: I've got "data transformation rule
22 sets."

23 THE COURT: All right.

24 MR. O'NEILL: Your Honor, here are the competing
25 constructions for "data transformation rule sets." It seems

1 really to turn on whether or not we ought to say these rule
2 sets are transforming data or transforming data bags seems to
3 me to be the key distinction there. We think that you should
4 not replace the word "data" with "data bags." We think the
5 claim language is unambiguous, and we also think that the
6 specification supports a construction that "rule sets" are
7 collections of rules for transforming data, not data bags.

8 The claim language is the place to start. "Data
9 transformation rule set," Your Honor, is almost
10 self-explanatory and self-definitional. These are rule sets
11 for transforming data. The preamble of the claim says this is
12 a system for transforming data. So if we look at the claim
13 language, it is clear.

14 Now, interestingly enough, the claim does talk about
15 doing something with data bags. The claim uses the word
16 "manipulating" not transforming, so to be consummate with the
17 plain language of the claim, the rule sets are transforming
18 data, not data bags. In the specification we see the same
19 theme, here the title and the abstract, it is a system for
20 transforming data. In the abstract, data is transformed
21 within the system using rule sets that act upon data bags.

22 And you will see in a couple of these passages they
23 talk about data bags being treated, perhaps, somewhat
24 differently than the data. The rule sets transform the data.
25 The data bags are manipulated or they are "populated," using

1 terminology like that. The word "populate" is at the very
2 last line of the second excerpt there, Your Honor, Column 6,
3 Line 32. So the specification is perfectly consistent with a
4 construction that says "data transformation rule sets
5 transform rules."

6 THE COURT: Response?

7 MR. PENSABENE: Your Honor, looking to the
8 specification again, this is another term that is clearly
9 defined in the specification. We know it is defined because
10 it uses the key words. It says "rule sets" are collections of
11 rules within the present invention. "Rule sets" are used to
12 transform a data bag in one format into another data bag of
13 different format. These are words that case law, the
14 Sinorgchem case in particular, has recognized indicate a clear
15 intention to define the term.

16 JuxtaComm runs away from the definition, claims the
17 term is not defined in the specification and instead asks that
18 the term "data transformation rule sets" be defined in the
19 abstract. They prefer you ignore the specification, look at
20 those terms, and just construe it based on that. By
21 comparison, the defendants' construction mirrors exactly what
22 is contained in the definition from the specification using
23 the exact same language, again, just shortened up a little bit
24 for the purpose of readability.

25 THE COURT: Next term.

1 MR. O'NEILL: I believe we are on to the last one,
2 Your Honor, which is "systems interface."

3 THE COURT: All right.

4 MR. O'NEILL: Okay. Here we are. "Systems
5 interface," Your Honor, we say it is "an interface to the
6 distribution system." They say "it is a component that
7 enables a user to interact with the system." We believe,
8 number one, no construction is necessary. Number two,
9 defendants' construction, again, violates the principle of
10 claim differentiation, which is a presumption; and they have
11 done nothing to overcome the presumption.

12 Why is no construction required? Your Honor, it is
13 a "systems interface" that is an interface to this system. We
14 don't think the jury or anyone else needs any further
15 instruction on that, and the Federal Circuit in Phillips says,
16 hey, sometimes claim language is plain, and even ordinary
17 people can understand it. We think that is the case here.

18 Moreover, the specification talks about a number of
19 different interfaces to this system so that it is improper to
20 limit this "systems interface" to any particular interface,
21 such as the user interface they want to drop in the claim. I
22 have highlighted for you an excerpt from the specification
23 that says, "For example, the script processor can be initiated
24 either from the graphical interface" -- that is the user
25 interface, Your Honor -- "or from an interface external to the

1 system." There can be other interfaces to the system. That
2 is what the specification says.

3 We think Claim 1 is broad enough to encompass other
4 interfaces without specifying. It is just an interface to the
5 system. In fact, Claim 2 is the claim that adds further
6 details or limitations to this systems interface. Claim 2
7 says, "wherein said systems interface comprises a
8 configuration management user interface." That is the user
9 interface that the defendants want to put into the
10 construction of "systems interface." So, once again, claim
11 differentiation.

12 THE COURT: Response?

13 MR. PENSABENE: Your Honor, Mr. O'Neill points out
14 that the debate here, I think, centers around whether or not
15 the "systems interface" in the claim terms is a user
16 interface. The defendants' proposed construction reflects the
17 fact that it should be a user interface based on the
18 specification.

19 THE COURT: How do you get around the Claim 2 claim
20 differentiation?

21 MR. PENSABENE: Claim 2 does not recite any user
22 interface in the abstract. Rather, it recites a configuration
23 management user interface. Configuration management user
24 interface is a very specific type of user interface that does
25 things beyond just providing the ability of a user to interact

1 with the system. For example, in the text that Mr. O'Neill
2 put up on the screen before, you see that the configuration
3 management user interface can be used to invoke the script,
4 start the script. That is not something in Claim 1, and that
5 is something -- a more specific limitation than just a regular
6 "user interface."

7 THE COURT: Go ahead.

8 MR. PENSABENE: Turning to the specification then,
9 it is the defendants' view that the term "systems interface"
10 needs to be interpreted in light of the specification. The
11 law is very clear on that. We start there by noting that that
12 "systems interface" is not used -- that term, as it appears in
13 the claim, is not used anywhere in the specification. What
14 the claims say is that this "systems interface" is used for
15 defining certain things. It is used to defining the logical
16 import and export data interfaces, the data transformation
17 rule sets, and the scripts. The specification, as you read
18 on, expressly states that all of these functions are performed
19 by a user.

20 On this next slide I have got some examples from the
21 specification where it describes that all of these
22 functions -- these functions that the claim says are performed
23 by the "systems interface," the specification describes all of
24 them as being performed by a user interface. So, for example,
25 the first quote taken from Column 2 of the patent states, "It

1 is another object of the present invention to provide a means
2 of configuration management that allows a user of the system
3 to define scripts, import data connections, export data
4 connections, data bags, and the rule set definitions."

5 So here it is an object of the invention to allow a
6 user to provide these definitions. Likewise, I won't read
7 these for the sake of time, but the other statements from the
8 specification are all consistent with this; that a user is the
9 one that provides these definitions.

10 THE COURT: Anything further?

11 MR. O'NEILL: It is an object of the invention to
12 supply that user interface, Judge and that object is achieved
13 by Claim 2. We have given you the cases in our brief where
14 the Federal Circuit says not all of the claims have to achieve
15 all of the objects. This object is in Claim 2. It is simple.

16 THE COURT: All right. Thank you. Does that
17 complete all of our claim terms?

18 MR. O'NEILL: It does.

19 THE COURT: Thank you both for excellent arguments.
20 Let me inquire, when are you set for trial?

21 MR. MACON: November 9th.

22 THE COURT: November 9th. I am getting a little
23 behind. It may be six weeks or two months before I can get a
24 formal opinion out. Let me ask you if it would be helpful to
25 the parties for me to get out a preliminary ruling that would

1 not include the full-blown opinion but give you some guidance
2 in working with your experts --

3 MR. MACON: Your Honor, it would.

4 MS. HUNSAKER: Yes, Your Honor.

5 THE COURT: We will try to do that in the next few
6 days then and allow you to move forward.

7 Who is your mediator in this case?

8 MR. MACON: Jim Knowles is our mediator.

9 THE COURT: Have y'all had a mediation?

10 MR. MACON: We had a mediation. We were successful
11 with a number of the defendants. There are still several
12 others who we are still in discussions with.

13 THE COURT: All right.

14 MS. HUNSAKER: Your Honor, if I could ask the Court
15 the best way to submit the edits to the proposed construction
16 of the "utilizing" term? Would it be best to file --

17 THE COURT: I think I have got those down.

18 MS. HUNSAKER: You have got it. Thank you very
19 much.

20 THE COURT: As far as mediation, defendants have any
21 comment on that? Would another session be helpful, or are
22 y'all talking with the mediator, both sides?

23 MR. PENSABENE: Your Honor, according to the
24 scheduling order, there is a deadline for a second mediation.
25 The deadline for that is triggered by the decision on claim

1 construction, so I think it would helpful to have
2 clarification as to when that deadline would be, relevant to
3 the intermediate opinion or the formal opinion that the
4 Court --

5 THE COURT: I would think that you could go ahead
6 and mediate after the preliminary opinion, which you should
7 have, if not by the end of this week by the first part of next
8 week.

9 MR. MACON: We will be agreeable to that.

10 THE COURT: Y'all go back, visit with Mr. Knowles,
11 see if you can work out a business solution to your problem.
12 If not, we will see you in November.

13 MR. MACON: Thank you very much, Your Honor.

14 MR. O'NEILL: Thank you, Your Honor.

15 (End of proceedings.)

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1 C E R T I F I C A T I O N

2

3 I certify that the foregoing is a correct transcript from the
4 electronic sound recording of the proceedings in the
5 above-entitled matter.

6

7

8 /s/ Shea Sloan

9 SHEA SLOAN, CSR, RPR
10 OFFICIAL COURT REPORTER
10 STATE OF TEXAS NO. 3081

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